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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GESTEMANI BOLIA-SCHUTT, as Administrator, etc. et al.,

Plaintiffs and Appellants,

v.

CEDAR FAIR, L.P. et al.,

Defendants and Respondents.

G033685

(Super. Ct. No. 02CC13037)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James M. Brooks, Judge. Affirmed.

Law Offices of Barry Novack and Barry B. Novack; Law Office of Lisa Stern and Lisa Stern, for Plaintiffs and Appellants.

Manning & Marder, Kass, Ellrod, Ramirez, Jeffrey M. Lenkov and Sylvia Havens, for Defendants and Respondents.

* * *

Gestemani Bolia-Schutt, as administrator of the estate of Justine Bolia, Emmanuel, Ofil, and Enoch Bolia (decedent's brothers), and Patricia Eboko (her aunt) appeal from a judgment of dismissal of their claims for wrongful death and bystander emotional distress following summary judgment in favor of Cedar Fair, L.P., Cedar Fair Management Company, Magnum Management Corporation, and Knott's Berry Farm amusement park (collectively, KBF). Twenty-year-old Justine died from a ruptured cerebral aneurysm suffered while riding KBF's roller coaster, "Montezooma's Revenge."[1] When Justine boarded the ride, neither she nor anyone in her family suspected she had an aneurysm, which was later discovered during the autopsy. Plaintiffs contend the trial court erred in concluding KBF owed no duty to warn passengers the roller coaster posed a danger to "apparently healthy" persons who suffered from preexisting aneurysms or similar conditions, unknown to them or KBF.

The trial court reasoned "no reasonable warning would have put [Justine] on notice that the ride could be dangerous to her." The undisputed evidence showed life-threatening aneurysms are rare in the general population and have proved benign, if present, to all but one of Montezooma's Revenge's millions of passengers since the ride opened in 1978. The risk of rupture is demonstrably slight and, as in Justine's case, usually unknowable because the condition is asymptomatic. We therefore conclude it would be unreasonable to require an amusement park to warn its patrons of this risk. Consequently, we affirm the judgment.

[1] We use the parties' first names for clarity in distinguishing family members (see *Nairne v. Jessop-Humblet* (2002) 101 Cal.App.4th 1124, 1126, fn. 1) and, for Justine in particular, as a way of recognizing her youth and the tragedy of her untimely death.

I

FACTUAL AND PROCEDURAL BACKGROUND

We derive the facts from the parties' respective separate statements of material fact in their filings supporting and opposing summary judgment. (See Code Civ. Proc., § 437c, subds. (b)(1) & (b)(3).)

On August 31, 2001, Justine, visiting from the Democratic Republic of the Congo, accompanied her brothers, aunt, and a family friend, Zemba Mekanisi, on an outing to Knott's Berry Farm amusement park. Justine's brothers translated the warning signs on the rides for her, as she was fluent in French and Lingala but not English. After the group warmed up on the "Jaguar" roller coaster, which one of the party described as "rather tame," Justine wanted "something more exciting," and led the way to Montezooma's Revenge, where the group waited approximately 15 minutes watching the ride go through several cycles.

As the group stood in line, Emmanuel read to his sister the posted ride instructions and warning, as follows: "No smoking, eating, or drinking. [¶] No loose articles. [¶] You must be in good health to take this high-speed roller coaster ride (free from heart & nervous disorders, weak back or neck, or other physical limitations). [¶] No expectant mothers." The warning prompted no concerns in the group, except that Emmanuel advised Justine to discard her chewing gum.

Around 7:00 p.m., Emmanuel, Justine, their aunt, and Zemba boarded the roller coaster, and Enoch and Ofil awaited the next cycle, first in line. Justine laughed and screamed with excitement during the 36-second ride. Approximately six seconds before the ride ended, Justine turned back to Emmanuel, seated behind her, and yelled, "yes, yes" excitedly. But as the roller coaster pulled into the platform area, Ofil heard Justine mumbling, "Jesus, Jesus, Jesus!" Her family looked on helplessly as she began convulsing and lost consciousness. Another rider attempted mouth-to-mouth resuscitation, as did paramedics at the scene and en route to the hospital, where Justine

struggled back from cardiac arrest at least three times, but died at 1:35 a.m. the next morning.

According to one of the plaintiffs' experts, Dr. Claus P. Speth, Justine "had no known personal or family history of aneurysms, migraines, hypertension, alcoholism, cigarette smoking, contraceptives or known connective tissue diseases (these are some of the suspected risk factors for development and rupture of cerebral aneurysms). . . . Most notably, although she occasionally had transient headaches associated with menstrual periods, there was no history of an unusual, different headache at any time preceding August 31, 2001." Justine's mother described her as a "strong" person, who "could do anything" and "did everything," despite a sickle cell disease diagnosis, which generally posed "no problem." She had suffered a sickle crisis in January 2001, but "was otherwise in good health," requiring "no medications, and no medical restrictions had been placed upon her."

The coroner's autopsy determined Justine's cause of death to be "Anoxic encephalopathy" due to "Acute subarachnoid hemorrhage," in turn "DUE TO: Ruptured berry aneurysm, left middle cerebral artery." Based on his review of autopsy slide specimens, Speth described the aneurysm as "round, about 4 mm in diameter," having "a generally thin wall" and "ar[ising] in the asymmetric bifurcation of the involved arteries." Speth concluded the aneurysm was "preexistent" and found "no evidence of prior hemorrhage or leakage."

A safety engineer from the Department of Industrial Relations inspected the roller coaster after the accident, including the car in which Justine rode, and concluded the ride "was operating within the manufacturer's specifications."

Justine's estate subsequently filed suit against KBF for premises liability, strict products liability, "product negligence," and common carrier liability (Civ. Code, §§ 2100, 2101), and her brothers and aunt also brought actions personally for negligent

infliction of emotional distress. Plaintiffs' theory of liability was that the warning on Montezooma's Revenge was inadequate.

Discovery spats ensued and on April 30, 2003, the trial court granted plaintiffs' motion to compel KBF to respond to special interrogatories. Plaintiffs specifically sought KBF's response to Interrogatory No. 24: "Are you aware of any other incident in which a rider of any other amusement ride owned or operated by YOU is alleged to have suffered a brain bleed or brain injury from riding on a ride, regardless of whether any claim or litigation arose therefrom?" The trial court granted plaintiff's motion "only as to claims of brain injury/brain bleed from thrill rides such as roller coasters or rides similar to the Montezooma's Revenge ride."

KBF responded that "Defendant to its knowledge never has had any such claims made against it other than that of present Plaintiffs." On July 10, 2003, plaintiffs moved for sanctions because defendants failed to disclose a 1999 Pennsylvania lawsuit filed against defendant Cedar Fair, L.P., alleging its "Steel Force" roller coaster caused a woman to suffer "damaging pools of blood on both sides of her brain (multiple bilateral subdural hematoma) . . . ." The trial court appointed a referee to assess defendants' compliance, or lack thereof, with its discovery order, but the referee ultimately recused himself and the parties agreed on a substitute just one week before KBF's summary judgment motion.

KBF moved for summary judgment or, in the alternative, summary adjudication, on September 30, 2003. In their opposition, plaintiffs submitted the declaration of industrial engineer, David A. Thompson, who opined that a satisfactory, effective warning must caution riders that "even if they believe they are in good health, the ride can cause, and has caused in the past, serious injury including but not limited to: fractures, loss of consciousness, paralysis, brain bleeds and death, Ride at Your Own Risk!" Justine's brothers declared that if there had been such a warning, they would not have permitted her to ride Montezooma's Revenge. The trial court, however, sustained

KBF's objection to aspects of this warning as irrelevant to Justine's case and, ultimately, as unreasonable and not required by any duty of care. The court granted KBF's summary judgment motion.

Specifically, the trial court found "there is a duty to warn of known hazards," but because Justine "had no knowledge of the fact that she had this dangerous aneurysm in her brain[,] . . . no reasonable warning would have put her on notice that the ride could be dangerous to her." The court concluded that "to claim the warning should state that [the] ride could cause death even to healthy persons . . . is unreasonable. If that is true, the ride should simply be closed and plaintiff is not claiming that." The court also found that Justine assumed the risks inherent in the roller coaster ride, and that KBF was not a common carrier under the Civil Code and hence did not owe a common carrier's duty of utmost care (Civ. Code, § 2100). Because KBF owed no duty to post plaintiffs' proposed warning, the trial court rejected their negligence-based bystander liability claims.

Finally, the court noted "plaintiff claims that it still has not received discovery that the court ordered regarding brain bleed and other injuries that have been sustained at Knotts over the years. Plaintiff claims that on its motion for sanctions, the court sent the parties to a referee. There was a long delay and according to plaintiff the original referee withdrew and only last week did the parties agree to a new referee[.] However, whether or not there were brain bleeds, the evidence is that plaintiff acted and believed she was in good health and [was] unaware of any health limitations that would have prevented her[] from going on the ride, even if stronger warnings were posted. To say plaintiff would not have gone on the ride, given a stronger warning, is pure speculation." The court concluded: "The additional discovery sought is immaterial to the issues raised in the summary judgment" motion.

Plaintiffs moved for reconsideration solely on the trial court's assumption of the risk finding. The court denied the motion, entered judgment in favor of KBF, and plaintiffs now appeal.

II

DISCUSSION

A. *Summary Judgment and Duty to Warn Principles*

We review a grant of summary judgment de novo. (*Ogborn v. City of Lancaster* (2002) 101 Cal.App.4th 448, 456-457.) A defendant moving for summary judgment meets its "burden of showing that a cause of action has no merit" by "show[ing] that *one or more elements of the cause of action . . . cannot be established*, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2), italics added.) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

The gravamen of plaintiffs' complaint — that KBF failed to adequately warn of the alleged danger posed by Montezuma's Revenge — is grounded in premises liability, strict products liability, and negligence. Similar, well-established principles governing these three theories require us to affirm the trial court's grant of summary judgment.

As to premises liability, a landowner is responsible "for an injury occasioned to another by his or her want of ordinary care or skill in the management of

his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." (Civ. Code, § 1714, subd. (a).) The duty owed is one of reasonable care, and a landowner's failure to repair, or warn of a dangerous condition can constitute negligence. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 (*Rowland*), superseded by statute on another ground, as stated in *Perez v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 462, 467.)

In *Rowland*, the Supreme Court explained that a landowner's duties, including the duty to warn of a dangerous condition, are determined by the following factors: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland, supra*, 69 Cal.2d at p. 113.) "Whether a given set of facts and circumstances creates a dangerous condition is usually a question of fact. [Citation.] The issue of a dangerous condition becomes a question of law only where reasonable minds can come to only one conclusion. [Citation.]" (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 991.)

Similarly, the adequacy of a warning in the products liability context is generally a question of fact unless reasonable minds could not differ. (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 (*Jackson*).) "Under California law, a product may be defective because of the absence of an adequate warning of the dangers inherent in its use." (*Ibid.*) "Even though the product is flawlessly designed and manufactured, it may be found defective within the general strict liability rule and its manufacturer or

supplier held strictly liable because of the failure to provide an adequate warning." (*Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 174.) Whether a warning is adequate depends on several factors, including "the normal expectations of the consumer as to how a product will perform, degrees of simplicity or complication in its operation or use, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning." (*Jackson, supra,* 223 Cal.App.3d at p. 1320.)

Our Supreme Court has emphasized that "failure to warn in strict liability differs markedly from failure to warn in the negligence context." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002 (*Anderson*).) "Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. [Fn. omitted.] Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial. [¶] Stated another way, a reasonably prudent manufacturer might reasonably decide that the risk of harm was such as not to require a warning as, for example, if the manufacturer's own testing showed a result contrary to that of others in the scientific community. Such a manufacturer might escape liability under negligence principles. In contrast, under strict liability principles the manufacturer has no such

leeway; the manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product." (*Id.* at pp. 1002-1003; accord, *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112-1113.)

B. *No Duty to Warn Under Any of Plaintiffs' Theories of Liability*

As a matter of premises liability, the *Rowland* factors do not support imposition of a duty to warn that Montezooma's Revenge posed a danger, as plaintiffs assert, to "apparently healthy" persons who suffer from a preexisting aneurysm or similar condition. First, the foreseeability of harm to Justine absent a warning was extremely remote. Montezooma's Revenge carried millions of passengers — as many as 44 million — between its opening in 1978 and Justine's accident, and there was no evidence any other rider had suffered a ruptured aneurysm.[2] Plaintiffs sought to demonstrate the risk is higher than a layperson might imagine because undiagnosed, asymptomatic aneurysms afflict as much as six percent of the general population, according to Speth. But this proves the opposite, for if six percent of the millions who rode Montezooma's Revenge did so without incident in spite of a preexisting aneurysm, the foreseeability of harm to

[2] Plaintiffs attack the specific "44 million" figure because the trial court granted their motion to strike Knott's Berry Farm's risk manager's declaration in its entirety, where the number first appeared. Along with opinions the manager was clearly not qualified to offer on "mechanical issues" and "manufacturer's specifications," his declaration stated that "'Montezooma's Revenge' amusement ride is estimated to have carried approximately 44 million passengers since its opening at Knott's Berry Farm in May of 1978." KBF offered the figure in support of its contention the risk of a ruptured aneurysm on Montezooma's Revenge was very low. Although the trial court sustained plaintiffs' objection to the number on foundational grounds when it threw out the declaration entirely, the foundational objection does not appear well-founded, for the declarant stated he was familiar with the "background and history" of the ride. In any event, plaintiffs did not object to the Department of Industrial Relations inspector's report stating the *hourly* capacity of the ride was 1,344 passengers and that the ride opened nearly 25 years earlier, on May 25, 1978, supporting the conclusion millions of passengers rode Montezooma's Revenge.

any particular rider in this supposedly at-risk class is very low. While there is no doubt Justine suffered injury — the second *Rowland* factor — the foregoing numbers demonstrate the third factor, the closeness of the connection between the defendant's conduct and the injury suffered, is slim to nonexistent.

True, the trial court sustained KBF's objection to Speth's citation of 65 other "direct and indirect inertial brain injuries associated with amusement rides" around the country. But this evidence, if admitted, would have made the risk of injury no more foreseeable since it is reasonable to assume the subject pool of riders on the attractions in the 65 incidents nationwide corresponded to a figure well beyond the millions of riders on Montezooma's Revenge alone. Moreover, we cannot say the court erred, as plaintiffs assert, in striking many of these incidents, for Speth admitted the "[p]redispositions and risk factors" for some of the medical conditions involved were "different from those involved in . . . aneurysms . . . ." They were therefore properly stricken as irrelevant to the foreseeability of a ruptured aneurysm. Similarly irrelevant among the 65 incidents were the concussion cases and vague "additional cases," including one admittedly "questionable because of incomplete information." Again, these had no bearing on the foreseeability question at hand. Indeed, the foreseeability of a ruptured aneurysm on Montezooma's Revenge was best measured by the millions-to-one ratio for that very ride, rather than other rides. Thus, the court did not err in striking portions of Speth's declaration.

Likewise, the trial court's exclusion of Thompson's proposed warning does not constitute error. Thompson suggested cautioning riders that "even if they believe they are in good health, the ride can cause, and has caused in the past, serious injury including but not limited to: fractures, loss of consciousness, paralysis, brain bleeds and

death, Ride at Your Own Risk!" The trial court properly sustained KBF's objection to this language because neither the risk of fractures nor paralysis were at issue in Justine's case. Nor were brain bleeds, for as the trial court observed, plaintiffs' attempt "to create a triable issue of fact as to [the] cause of death as a 'brain bleed'" distorted the evidence because the autopsy clearly stated the brain bleed did not occur in a vacuum, but rather was "*due to* the ruptured aneurysm." Justine's loss of consciousness was similarly explained by a lack of oxygen, or "Anox[ia]" as stated on the autopsy report, itself "DUE TO" the "Ruptured berry aneurysm."

More accurately, Thompson's warning might have advised riders of the possibility of brain bleeds and loss of consciousness due to preexisting aneurysms, but therein lies the rub: Justine did not know she had an aneurysm, so such a warning could not possibly have been effective. (Cf. *Rosburg v. Minnesota Mining & Mfg. Co.* (1986) 181 Cal.App.3d 726, 735 [no duty in products liability context to give a warning that could not possibly be effective in lessening plaintiff's risk of harm].) Notably, the warning would have served no purpose even if a team of medical specialists stood beside Justine in line, for she exhibited no aneurysm symptoms and presented no risk factors such as family history, migraines, hypertension, etc. The declarations by Justine's brothers that they would have had her heed Thompson's later proposed warning are, as the trial court concluded, purely speculative. (See *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 ["evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact"].) Indeed, it would be no more than sheer coincidence if an "apparently healthy" person who decided to heed a warning like Thompson's actually had an

aneurysm. Mere coincidence, by definition, does not establish foreseeability. For these reasons, there was no error in striking Thompson's suggested warning.

In sum, *Rowland*'s foreseeability and closeness of connection factors do not weigh in favor of a duty to warn. Foreseeability is a particularly important factor, for as Judge Cardozo famously explained, "The risk reasonably to be perceived defines the duty to be obeyed . . . ." (*Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339, 344.) Put another way, "[m]ore than a mere possibility of occurrence is required since, with hindsight, everything is foreseeable." (*Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 465 [products liability case].) Speth acknowledged that even if, as he claimed, a "significant percentage of the riding public has constitutional, genetic and/or acquired predispositions to these injuries, . . . there is a wide constantly changing spectrum of individual variability as it relates to susceptibility and vulnerability to these injuries." In light of this undisputed evidence, Knotts could not have foreseen that Justine, among the ride's millions of riders with preexisting aneurysms, would suffer a rupture.

Rowland's remaining factors also weigh against a duty to warn here. The fourth factor, moral blame attached to the defendant's conduct, is not present precisely because the fifth factor, the efficacy of preventing future harm, is zero, where, as discussed, the warning reaches its target audience of those with aneurysms only coincidentally. The relation is only coincidental because the passengers declining to ride based on the warning do not know whether they have an aneurysm. As to the sixth factor, shouldering defendants with liability for failure to warn of the dangers associated with a rider's unknown health conditions appears to be a meaningless but potentially costly gesture, with the likely community consequences being complete disregard for a warning that cannot rationally be heeded and/or a multiplication of claims for all manner

of unknown health conditions. Finally, since responsible insurance companies are not in the business of underwriting unknown risks, the availability, cost, and prevalence of insurance are nonissues. In any event, neither landowners nor manufacturers or operators are themselves insurers of the public safety against all possible risks. (See *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 399; *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1003-1004.)

Turning to plaintiffs' strict products liability theory, the factors articulated in *Jackson* for a duty to warn do not support imposing such a duty here. While the nature and magnitude of the injury to which the user is allegedly exposed is grave, the likelihood of injury and the beneficial effect of including a warning are slim to none, respectively. (See *Jackson*, *supra*, 223 Cal.App.3d at p. 1320.) As discussed, the likelihood of injury even among the supposedly vulnerable passengers with aneurysms is, at most, one in millions. And the proposed warning to "apparently healthy" persons could have no beneficial effect since persons with an unknown aneurysm or other condition would have no reasonable basis for deciding whether to heed the warning. (See *ibid.*) It would be an unreasonable, idle act to require such a warning. (Civ. Code, § 3532 ["The law neither does nor requires idle acts"].)

Given that plaintiffs' strict products liability claim fails, it follows that their negligence claim does as well. Since reasonableness is the touchstone of a duty to warn in the products negligence context (see *Anderson*, *supra*, 53 Cal.3d at pp. 1002-1003), and no evidence showed KBF knew or should have know of a risk posed by unknown aneurysms or that a warning would have any effect, there was no negligence.

Plaintiffs contend KBF is a common carrier and its resulting duty of utmost care and diligence to passengers requires their proposed warning. In *Gomez v. Superior*

Court (2005) 35 Cal.4th 1125 (*Gomez*), the Supreme Court concluded "the operator of a roller coaster or similar amusement park ride can be a carrier of persons for reward [i.e., a common carrier] within the meaning of Civil Code sections 2100 and 2101." (*Id.* at p. 1127.) Civil Code section 2100 provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." Section 2101 states: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

While these provisions arguably establish a form of strict liability for common carriers — a question we do not decide — as we have seen in the products liability context, strict liability does not require warnings where the likelihood of injury is not reasonably foreseeable and the warning would have no beneficial effect. These principles apply here. *Gomez* was careful to reaffirm that common carriers "do not warrant the safety of passengers" (*Gomez*, *supra*, 35 Cal.4th at p. 1130) and, as in the premises liability and strict products liability contexts, it has long been the law that "[c]ommon carriers are not . . . insurers of their passengers' safety." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785.) Plaintiffs' appeal on this ground therefore fails.

Finally, plaintiffs argue the trial court erred in failing to grant a continuance to require KBF to respond fully to interrogatories regarding instances of brain injuries or brain bleeds on defendants' other roller coasters around the country. According to plaintiffs, the lawsuit filed in Pennsylvania and "at least two other incidents" at another Cedar Fair amusement park demonstrate the inadequacy of defendants' discovery

response. Plaintiffs rely on our opinion in *Frazee v. Seely* (2002) 95 Cal.App.4th 627, where we concluded "the interests at stake are too high to sanction the denial of a continuance without good reason. '[T]echnical compliance with the procedures of Code of Civil Procedure section 437c is required to ensure there is no infringement of a litigant's hallowed right to have a dispute settled by a jury of his or her peers.' [Citation.]" (*Id.* at p. 634; see Code Civ. Proc., § 437c, subd. (i) [court shall grant continuance to permit discovery if party seeking summary judgment has unreasonably failed to allow discovery].)

But plaintiffs neither requested a continuance, nor raised the issue in their petition for reconsideration, which would have enabled the trial court to correct any problem. The argument is therefore waived. Moreover, on the merits, the trial court determined the additional discovery was "immaterial." The trial court has wide discretion on evidentiary matters, and we cannot say the court abused its discretion in concluding incidents involving Montezooma's Revenge were the best evidence of a need for a warning on that ride. In any event, as discussed, a few more incidents around the country — with, presumably, a corresponding increased number of annual, uneventful passenger trips on those roller coasters — would not make Justine's accident any more foreseeable.

Because we affirm on the grounds that KBF owed no duty to the plaintiffs to post their requested warning to "apparently healthy" persons, we need not address their contentions the court erred in finding Justine assumed the risk of riding Montezooma's Revenge or that they could not recover as bystanders for a breach of duty.

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs. (Cal. Rules of Court, rule 27.)

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.